IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

S.B.Civil Writ Petition No.2958/2007

Kashi Ram.

vs.

Civil Judge (SD), Shahpura and others.

Date : 3.7.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr.Vijay Bishnoi, for the petitioner.
Mr.Manish Shishodia, for the respondent no.2

- - - - -

BY THE COURT :

At the request of learned counsel for the parties, the present writ petition is heard finally.

The petitioner/winning candidate has challenged the order of the Election Tribunal dated 8.5.2007 by which the learned civil court allowed the application of the respondent no.2/election petitioner filed for recounting of the votes.

Brief facts of the case are that the writ petitioner was declared elected as member of Ward No.18 of Panchayat Samiti, Shahpura on 8.2.2005. The respondent no.2/election petitioner was also candidate and he lost by only 4 votes. The respondent no.2 submitted election petition before the civil court wherein the respondent no.2 alleged serious irregularities in counting of votes. In the court below, issues were framed on 4.8.2005 which substantially relates to the alleged irregularities in the counting of votes. The evidence of both the parties were recorded and the case was at final arguments stage. The respondent no.2 submitted an application on 28.4.2007 before the civil court and prayed for recounting of the votes. In the application, merely it is mentioned that the difference of the votes of the election petitioner and winning candidate is only four and in case, the votes are recounted, then the position will be clear, therefore, in the present case also, the votes may be recounted by the order of the Court.

The winning candidate/writ petitioner submitted a detail reply to the application.

The court below observed that in the election, impartiality and transparency should appear and, therefore, it will be appropriate to order for

recounting the votes. The court below observed that in case recounting is ordered, none of the parties is going to suffer and further recounting will make the position clear and, therefore, the court below was of the view that recounting should take place and ordered accordingly.

Learned counsel for the petitioner submitted that the order of the court below dated 8.5.2007 is wholly without jurisdiction as is based on no factual foundation as well as has no legal foundation. It is also submitted that the Hon'ble Supreme Court in the judgment delivered in the case of Chandrika Prasad Yadav vs. State of Bihar and others reported in 2004(6) SCC 331 and in another judgment delivered in the case of M. Chinnasamy vs. K.C. Palanisamy and others reported in 2004(6) SCC 341, clearly held that before ordering recount of votes, the election tribunal should consider material available on record and should record prima-facie reason for satisfaction for passing of order of recount. It is also submitted that in a case where two candidates secured equal votes and recounting was ordered by High Court, the Hon'ble Supreme Court set aside the order of recounting in the judgment delivered in the case of Baldev Singh vs. Shinder Pal Singh and another reported in 2007(1) SCC 341. Learned counsel for the petitioner also relied on the judgment

of this Court delivered in SB Civil Writ Petition No.5885/2005 (Madan Lal vs. State of Raj. & another) decided on 27.10.2005 (by me) wherein even the order of inspection of ballot papers was set aside because the Tribunal failed to record the reason for such order as well as on the ground that even inspection of the ballot paper also violates the secrecy of votes and it cannot be disturbed unless there exists lawful reason.

Learned counsel for the election petitioner/ respondent no.2 vehemently submitted that the election petitioner's petition contains all sufficient facts on the basis of which the election petitioner was entitled to order for recounting of the votes as there were serious irregularities in the counting of votes. It is also submitted that the election petitioner submitted an application before the returning officer for recounting of votes but that was rejected. That shows the objection about irregularity in the counting of votes was raised forthwith by the election petitioner. It is also submitted that the election petitioner produced evidence to show that how the irregularities were committed in the counting of votes. In this situation, when the tribunal prima-facie found that it is a fit case for recounting of votes, then this Court may not interfere while exercising jurisdiction under Article 227 which is supervisory in nature.

Learned counsel for respondent no.2 relied upon the judgment of Hon'ble Supreme Court delivered in the case of Chanda Singh vs. Choudhary Shiv Ram Verma and others reported in (1975) 4 SCC 393 as well as the judgment of Hon'ble Supreme Court delivered in the case of Tanaji Ramchandra Nimhan vs. Swati Vinayak Nimhan & Ors. reported in AIR 2006 SC 1218.

I considered the submission of learned counsel for the parties and perused the record also.

From the impugned order dated 8.5.2007, it appears that the court below despite the fact that all the material in the form of evidence also were before the court but has not been considered by the court below before passing the order dated 8.5.2007. The Hon'ble Apex Court clearly held that mere difference of votes itself cannot be a ground for order of recount. It is also settled that mere averment in the election petition itself is not proof, even prima-facie proof, of allegation. The secrecy of vote is important and, therefore, in the judgments rendered, the Hon'ble Supreme Court time and again made it clear that the secrecy of votes should not be touched unless their exists lawful reasons.

In this case, the material has not been considered

by the court below and without there being any material, the court below has observed that there was a lack of impartiality as well as transparency in the process of election particularly in counting. That observation has no factual foundation and the Court has even not recorded another reason on the basis of which the court reached to this conclusion that at the time of counting, there was no impartiality and there was lack of transparency. Be it as it may be. It appears that the court was influenced by some observations made by the Hon'ble Supreme Court in the case of Tanaji Ramchandra Nimhan (supra) wherein the Hon'ble Supreme Court held that the order of recount can be passed only if material facts detailing irregularities in counting are pleaded. In this very judgment, the Hon'ble Supreme Court held that a general feeling or possibility cannot be a substitute for clear pleading and evidence in support of a prayer for recounting of the votes. In this case also, emphasis was on consideration of material before passing the order of recount in election matters.

In view of the above legal position, the impugned order dated 8.5.2007 cannot be sustained and liable to be quashed, hence, quashed. Consequently, this writ petition is allowed, the order dated 8.5.2007 is set aside. The election tribunal is directed to reconsider

the prayer of the respondent no.2 for recounting afresh and pass a reasoned order uninfluenced by the order passed earlier or any observation made in this order.

(PRAKASH TATIA), J.

S.Phophaliya